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In the Supreme Court of the United States

OCTOBER TERM, 1956

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 981

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

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A reply, in a few paragraphs, is appropriate in order to focus the issues and to mark out some of the erroneous or irrelevant arguments in the respondent's brief in opposition to our petition for certiorari.

1. The respondent asserts in its brief, pp. 4, 5, 8, 11, and 13, opposing certiorari that the Secretary is only a "nominal" party and has no administrative responsibility with respect to the regulations issued by a stockyard owner. If that were true, we would not have burdened the Court with this petition for certiorari.

The administrative duties of the Secretary apply, specifically, with regard to regulations issued by the various stockyard owners relative to the furnishing of "reasonable stockyard services" under 7 U. S. C.

1952 ed. § 205—the section relied on by the Court of Appeals for invalidating the regulations in this case. 7 U. S. C. 1952 ed. §§ 210 (a) and (c), 211, 212, 213 (a) and (b), and 222. The Secretary "may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201–203 and 205–217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections." 7 U. S. C. 1952 ed. § 210 (c). The "Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition * * *." Investigatory subpoenas may be issued by the Secretary in his administration of the Act (7 U. S. C. 1952 ed. § 222, incorporating 15 U. S. C. 1952 ed. §§ 46 and 48–50), and an investigatory subpoena *duces tecum,* issued by the Secretary in an investigation on his own motion, is judicially enforceable under the Packers and Stockyards Act (*Woerth* v. *United States,* 231 F. 2d 822, 823–825 (C. A. 8)).

The Secretary's duties under the Act include the issuance of administrative regulations. 7 U. S. C. 1952 ed. § 228. The regulations issued by the Secretary—applicable at more than 450 stockyards—provide that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned

to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area." 9 CFR Cum. Supp. § 201.63. The regulations issued by the Secretary are similar to a significant part of the regulations issued by the Denver Union Stock Yard Company and invalidated *in toto* by the Court of Appeals.

There can be no doubt as to the broad administrative responsibilities of the Secretary with respect to regulations relative to the furnishing of reasonable stockyard services, and the administrative responsibilities are underscored by the congressional enactment whereby the Secretary is authorized to participate "as of right" and be independently "represented by counsel," as in this case, with respect to litigation under the Packers and Stockyards Act (5 U. S. C. 1952 ed. §§ 1032, 1038, and 1040).

2. The reasonableness of the regulations, as to the furnishing of "reasonable stockyard services," should be determined on the basis of all the relevant facts. The Court of Appeals, however, held that the regulations are invalid on their face as a matter of law because, said the Court, "[i]f by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another" (see, our petition, Appendix A, p. 31). That is the decisive ground for the holding of the Court of Appeals, and the Court emphasized that even if evidence showed that the contested regulations

are conducive to the furnishing of reasonable stockyard services nonetheless an argument in support of the regulations, "even if proved to be soundly based in fact, has no legal significance" (*ibid.*).

The imaginant method of disposing of the case by the Court of Appeals is contrary to the administrative practice over a long period of time and, also, is contrary to the basic principle reapplied recently in *Alleghany Corp.* v. *Breswick & Co.*, Nos. 36, 82, and 114, this Term, decided on April 22, 1957. The determination of "reasonableness" with respect to the furnishing of stockyard services, like the standard of "control" involved in the *Alleghany* case, *supra*, involves "an issue of fact to be determined by the special circumstances of each case." *Id.* at p. 11, fn. 7, of slip opinion.

CONCLUSION

This case is of fundamental and wide importance to the Secretary in the administration of pivotal provisions in the Packers and Stockyards Act, and the case is likewise of fundamental and wide importance to one of the great branches of our agricultural economy. The petition for a writ of certiorari should, we submit, be granted.

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